STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2003
v	No. 231381 Gladwin Circuit Court
GORDON SCOTT DITTMER, Defendant-Appellant.	LC No. 99-006442-FC

Before: O'Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), conspiracy to commit first-degree premeditated murder, MCL 750.157a, first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of life imprisonment without parole for the first-degree murder conviction, life imprisonment for the conspiracy conviction, and six to fifteen years for the felon in possession conviction. He also received a twenty-five to fifty year sentence for the first-degree home invasion conviction, which was to be served consecutive to the murder and conspiracy convictions. Finally, he received a two-year term for the felony-firearm conviction to be served before his other sentences. Defendant appeals by right. We affirm.

Defendant first argues that he is entitled to a new trial based on the newly discovered evidence that a prosecution witness, John Benjamin, committed perjury at defendant's trial. We disagree. We review the trial court's ruling denying defendant's motion for a new trial for an abuse of discretion. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). In order to obtain a new trial based on a discovery that perjured testimony was introduced at trial, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, and (3) would probably have caused a different result, and was not discoverable and producible with reasonable diligence at trial. *Id.* Assuming for purposes of our analysis that the testimony at issue was actually perjured, we nevertheless conclude that it is not reasonably probable that evidence of John Benjamin's false testimony regarding this essentially collateral matter would have caused a different result at trial. The alleged perjury pertained to details of John Benjamin's travels when he allegedly followed the victim before defendant's involvement in the

alleged murder plot.[1] Because the testimony in question concerned a matter preceding defendant's alleged involvement in the murder plot, the only plausible benefit to defendant had the jury learned that John Benjamin lied about this matter would be to undermine John Benjamin's general credibility. However, the jury already had much reason to question Benjamin's integrity – particularly his acknowledged involvement in a plot to murder the victim in order to wrongfully receive life insurance benefits. Against this background, learning that John Benjamin had lied about the details of his prior travels would have added extremely little to the already apparent reasons to question his general credibility. Further, this was not a case that hinged solely on the credibility of Benjamin's testimony; there was substantial independent evidence to corroborate Benjamin's account of the events and defendant's involvement in the murder plot, including testimony from various witnesses who placed defendant in the company of Benjamin in proximity to the time and location to the murder. Additionally, two witnesses testified that defendant told them that he shot the victim. There was also evidence that after the murder, defendant had compact discs belonging to Barbara Cross, which were normally kept in the victim's house. Thus, we conclude that the trial court did not abuse its discretion by denying defendant's motion for a new trial on the basis of perjury by John Benjamin regarding a matter preceding defendant's alleged involvement.

Defendant next argues that the trial court erred by denying his request for a change of venue. However, we conclude that this issue has not been properly preserved for our review. The trial court denied without prejudice defendant's pretrial motion for a change of venue. Defendant, however, did not renew his motion and, thus, failed to act to prevent any perceived prejudice from proceeding with the trial in Gladwin County. See *People v Schmitz*, 231 Mich App 521, 527-528; 586 NW2d 766 (1998) ("The purpose of the appellate preservation of error requirements is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice."). Accordingly, we review this unpreserved matter for plain error that resulted in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The general rule is that "if a potential juror, under oath, can lay aside preexisting knowledge and opinions about the case, neither will be a ground for reversal of a denial of a motion for a change of venue." *People v Jendrzejewski*, 455 Mich 495, 517; 566 NW2d 530 (1997). In this case, no juror seated at the end of jury selection responded when the trial court asked if the jurors knew of any reason they could not be fair and impartial. Accordingly, we conclude that there was no plain error in proceeding with the trial in Gladwin County.

Next, defendant argues that his trial counsel provided ineffective assistance in failing to object to the admission of testimony from Larry Tatro regarding things said to him by Cross as inadmissible hearsay. We disagree. Contrary to the premise of defendant's argument, the testimony at issue was not inadmissible hearsay. Tatro's testimony that Cross asked him to kill

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[1] This matter apparently came to light because the prosecutor forthrightly sent a letter to appellate defense counsel advising him of inconsistent testimony by John Benjamin related to this matter. Contrary to the indication in the prosecution's brief on appeal, defendant does not argue that the prosecutor knowingly used false testimony against him.

the victim was not hearsay because it was not an assertion. It was a question or request, so it was incapable of being true or false. See *People v Jones (On Reh After Remand)*, 228 Mich App 191, 205; 579 NW2d 82 (1998), modified in part on other grounds 458 Mich 862 (1998) (a command that "is incapable of being true or false" cannot be hearsay). The remainder of the testimony at issue was admissible under the plain language of MRE 803(3), the state of mind exception to the hearsay rule. Specifically, Tatro's testimony that Cross told him that she wanted the victim killed so she could receive insurance money was admissible as a statement of her then existing intent and motive. Similarly, his testimony about her statements regarding how and when she wanted to kill the victim were admissible as statements of her then existing plan. Thus, trial counsel was not ineffective by not objecting to the testimony as inadmissible hearsay. Counsel is not required to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant next argues that the trial court erred by allowing the prosecutor to elicit testimony that prosecution witnesses John Benjamin and Billy Joe Benjamin promised to testify truthfully as part of their plea agreements. We disagree. Contrary to defendant's position, mere reference to a plea agreement containing a promise of truthfulness is not in itself a ground for reversal where, as in this case, it is not used by the prosecution to suggest that the government has special knowledge that the witness was testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

Defendant argues that the trial court erred by precluding him from cross-examining John Benjamin regarding a major misconduct determination issued against him by the Department of Corrections for falsely reporting that another inmate threatened him. In particular, defendant sought to admit this as evidence under MRE 404(b) that John Benjamin had a scheme or pattern of lying to get out of difficult situations. We review a trial court's ruling excluding evidence for an abuse of discretion. *People v McGuffey*, 251 Mich App 155, 160-161; 649 NW2d 801 (2002). For other acts evidence to be admissible as showing a plan, scheme, or system, "there must be such a concurrence of common features that the uncharged and charged acts[2] are naturally explained as individual manifestations of a general plan." *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). The circumstances of John Benjamin's alleged lying in the prison system were so different from the circumstances of his testimony against defendant in this case that they could not reasonably be considered to be naturally explained as manifestations of a general plan. Accordingly, the trial court did not abuse its discretion by excluding this evidence. Defendant's additional claim that denying cross-examination of John Benjamin regarding the prison misconduct violated his constitutional right to confrontation was not preserved by an appropriate objection on this basis below. Regardless, there was no violation of defendant's confrontation rights because cross-examination may be denied regarding "collateral matters bearing only on general credibility." *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

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[2] The use of the "charged" and "uncharged" terminology simply reflects that MRE 404(b) issues seem to typically arise in the context of the prosecution seeking to offer other acts evidence regarding a criminal defendant. However, nothing in the language of MRE 404(b) limits its applicability to evidence regarding a criminal defendant.

Finally, defendant argues that trial counsel was ineffective for failing to object to testimony from a rebuttal witness regarding defendant's silence. The witness effectively asked defendant if he were involved in the charged murder but he did not answer. Defendant now claims that asking this question was an impermissible comment on defendant's silence. We disagree. A defendant's prearrest silence is admissible as impeachment evidence where it would have been natural for a person to come forward with exculpatory information under the circumstances. *People v Hackett*, 460 Mich 202, 213-214; 596 NW2d 107 (1999). Before the rebuttal testimony at issue, defendant testified that he did not kill the victim. It would have been natural for defendant to deny his involvement with the murder if he were actually innocent. Thus, no proper basis for objection to the rebuttal testimony at issue as an improper use of defendant's silence would exist because it was permissible to impeach defendant's testimony that he did not kill the victim. Trial counsel was not ineffective for failing to futily object. *Milstead, supra.*

We affirm.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Jane E. Markey